No. 74-749

FEB 12 1975

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-749

ART THEATRE GUILD, INC. AND SHERPIX, INC., PETITIONERS

v.

LARRY E. PARRISH, THOMAS F. TURLEY, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 503 F. 2d 133. The memorandum decision of the district court (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on September 24, 1974. The petition for a writ of certiorari was filed on December 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to entertain the appeal.

2. Whether copies of a film determined, after an adversary hearing, to be obscene may be seized pursuant to search warrants in a number of locations for use as evidence in a criminal proceeding, when the copies are necessary and relevant to such proceeding and the distributor is permitted to make copies of the film.

3. Whether 18 U.S.C. 371, as applied in this case, is constitutional.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions and statutes involved are set forth in Appendix D to the Petition at pp. 43-44.

STATEMENT

Upon the government's application, the United States District Court for the Western District of Tennessee issued an order on May 26, 1972, directing the possessors of the film "School Girl" to show cause why the film should not be declared obscene and a warrant should not be issued authorizing the film's seizure (Pet. App. A, p. 20). The district judge viewed the film and a three-day adversary hearing was conducted.[2] The court declared

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[1]Although the government unsuccessfully challenged below the court of appeals' jurisdiction, we do not believe it necessary to cross-petition on this issue. This Court must notice jurisdictional errors, even *sua sponte*, if they have not been raised by the parties. See, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 677-678; *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209; *McGrath* v. *Kristensen*, 340 U.S. 162, 167; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 128, n. 3; *United States* v. *Corrick*, 298 U.S. 435, 440. A claim of lack of jurisdiction "may be considered, and appropriate judgment given, at any stage of the proceedings, either here or below." *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 359. If the court of appeals lacked jurisdiction to consider the merits, then of course this Court likewise lacks jurisdiction to review the merits by writ of certiorari.

[2]The district judge viewed the film on May 30, 1972, but delayed consideration of the obscenity issue to permit persons claiming an interest in the film to assemble proof on the issue and to present it in court (Pet. App. C, pp. 31-32).

the film to be obscene and authorized the government to retain it for a possible prosecution under 18 U.S.C. 1462[3] (Pet. App. C, pp. 31-32). The court of appeals dismissed the appeal from this ruling, holding that since the district court's order related to a pending criminal proceeding it was not appealable under 28 U.S.C. 1291. *United States* v. *Two Cartons Containing One Motion Picture Film Entitled: "School Girl,"* 477 F. 2d 599 (C.A. 6).

On September 11, 1972, a grand jury sitting in the Western District of Tennessee returned a one-count indictment charging Art Theatre Guild, Inc.—one of the present petitioners and a participant in the prior adversary hearing—and one of its employees with having violated 18 U.S.C. 1462 by knowingly transporting an obscene motion picture ("School Girl") in interstate commerce. Shortly thereafter, grand jury subpoenas were issued for production of additional prints of the film and for records pertaining to its distribution and showing. Prior to the return date of the subpoenas, Art Theatre Guild, Inc., and Sherpix, Inc., the other petitioner here, instituted the present suit seeking an injunction against further seizures of prints of the film pursuant to the subpoenas and damages against the respondents (Pet. App. C, pp. 32-33).[4]

The district court treated the suit as a motion to quash the subpoenas pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. The court orally granted the motion to quash on October 6, 1972, insofar

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[3]Among other things, 18 U.S.C. 1462 prohibits knowingly "transporting in interstate commerce "any obscene, lewd, lascivious, or filthy * * * motion-picture film * * * ."

[4]Petitioners asserted in their complaint, which was filed on September 28, 1972, that they owned all prints and negatives of the film "School Girl."

as it applied to the seizure of additional prints of the film, on the ground that the government had not established sufficiently that additional prints were required at that stage of the investigation. The court required those served with the subpoenas, however, to retain the prints in their possession, to refrain from altering or destroying them and to maintain certain records concerning their locations (Pet. App. C, p. 33).

After the district court partially quashed the outstanding subpoenas, the government secured search warrants from United States magistrates in several jurisdictions authorizing the seizure of any prints or negatives of the film found in the places designated in the warrants. One of the affidavits submitted with the applications for the warrants stated that the prints were needed in connection with a continuing investigation of a possible conspiracy to distribute the film in violation of 18 U.S.C. 1462 and 1465 (Pet. App. C, pp. 33-35).

On November 1, 1972, the present petitioners filed in the district court a motion for a preliminary injunction, complaining that execution of the search warrants was inconsistent with the court's dispostion of the motion to quash the subpoenas. After a conference in chambers, the court directed petitioners to amend their earlier complaint to reflect events which had occurred subsequent to the court's ruling with respect to the subpoenas. On November 3, 1972, petitioners filed a supplemental motion for a preliminary injunction, seeking to restrain further execution of the search warrants. Petitioners filed an amended and supplemental complaint on November 24, 1972 (Pet. App. C, pp. 33-35).

The district court denied petitioners' motion for a preliminary injunction (Pet. App. C, pp. 30-42). The court stated that in cases involving an ongoing investigation of possible criminal activities, a court must proceed "with great restraint and caution" (*id.* at 36). The court also noted that the relevant circumstances had changed since its quashing of those portions of the subpoenas directing the production of additional prints of the film and that, in light of those changed circumstances, petitioners had not carried their burden of showing harassment or bad faith by the government.

According to the court, "a blanket restraint on the U.S. Attorney [such as that sought by petitioners] against attempts to obtain evidence in furtherance of bona fide investigations and prosecutions for violations of the United States laws would be equally as repugnant as authorizing a massive seizure without a prior adversary hearing" (Pet. App. C, p. 41). The court, however, stated that its decision was not meant to relieve the government of its overriding responsibility not to seize any material not relevant and necessary to the criminal prosecution and to return promptly any material found to be unnecessary after a good faith seizure (*id.* at 41-42). 41-42).

The court of appeals affirmed (Pet. App. B, pp. 28-29). It pointed out that two and one-half months after the district court denied petitioners' motion for a preliminary injunction, an indictment had been returned superseding the indictment against Art Theatre Guild, Inc. The new indictment charged petitioners and others with substantive violations of 18 U.S.C. 1462 and with having conspired, in violation of 18 U.S.C. 371, to distribute an obscene motion picture ("School Girl") nationwide. Given this fact, the court noted that in the usual case the order would be non-appealable under *DiBella* v. *United States*, 369 U.S. 121.

The court proceeded to the merits of the present case, however, because of "the competing policy" urged by petitioners—encompassed in their alleged right to continue to distribute the film pending final resolution of the pending criminal proceeding (Pet. App. A, pp. 22-24).

With respect to the merits the court of appeals stated that its task was essentially to fashion a holding as consistent as possible with *DiBella* and *Heller* v. *New York*, 413 U.S. 483. In *Heller* this Court rejected the claim that the seizure of one print of a film subsequently found to be obscene constituted an impermissible prior restraint. The court noted that it was particularly significant that prior to seizure the film had been viewed by a neutral and detached magistrate, the seizure was for the bona fide purpose of preserving the print as evidence in a criminal proceeding and there was no showing or pretrial claim that the seizure prevented the film's continued exhibition.

As in *Heller*, the court of appeals in the present case pointed out that seizure of prints of the film "School Girl" had been preceded by " 'an * * * independent judicial determination of obscenity by a neutral detached magistrate * * * [and] the seizures [were] made to preserve evidence for a criminal prosecution ' " (Pet. App. A, p. 27). Because the seizure of more than one print of the film was involved here, however, the court remanded the case to the district court with directions to determine whether any material seized was not relevant and necessary as evidence in the criminal prosecution and to permit petitioners to make copies of those prints which had been seized and which were necessary and relevant to that proceeding *(ibid.)*.

ARGUMENT

Petitioners have posed two questions for review by this Court, one of which was considered and resolved against them by the court of appeals and the second of which they seek to raise now for the first time. We submit that petitioners' contentions are unsound, and that the court of appeals correctly refused to order the return of the prints of the film "School Girl" seized pursuant to the search warants. We also believe, however, that the court of appeals lacked jurisdiction to entertain petitioners' appeal and that, accordingly, there is no reason for this Court to reach the merits of the questions that petitioners present.

1. The court of appeals lacked jurisdiction over petitioners' appeal.

In *DiBella* v. *United States*, 369 U.S. 121, this Court held that the denial of a motion for the return of property and for its suppression in a criminal prosecution is not appealable because it is not a final judgment. The policy reasons underlying this holding are equally applicable to the present case. For example, the Court pointed out in *DiBella* that to permit immediate review of the denial of a motion to suppress would entail "serious disruption to the conduct of a criminal trial." *Id.* at 129. Petitioners have not suggested how this disruption would be lessened by their framing their challenge to the government's use of prints of the film "School Girl" in the form of a "separate" civil proceeding rather than the usual motion to suppress.

The Court also observed that permitting direct appeal of suppression orders would often lead to undue pre-indictment delays and jeopardize the availability of other evidence. It is irrelevant, therefore, that at the time the warrants were issued in the present case an indictment

had been returned against only one of the petitioners. In fact, a superseding indictment was subsequently returned against a number of other persons as well—an event that might have been delayed, if not jeopardized, had either the district court's decision or earlier action by the court of appeals impeded presentation of additional prints of the film before the grand jury.

Finally, in *DiBella* the Court noted that appellate review is an inappropriate and inadequate vehicle for testing the admissibility of evidence at trial or the prosecution's need to obtain particular evidence. For this reason, the Court stated that orders denying motions to suppress would be appealable only when the motion is "solely for return of property and is in no way tied to a criminal prosecution *in esse* against a movant * * *." *Id.* at 131-132. Neither of the present petitioners has or could successfully advance such a claim, and it therefore follows that the court of appeals should have dismissed petitioners' appeal for want of jurisdiction. See also *United States* v. *Calandra*, 414 U.S. 338, 354 n. 10; *Cogen* v. *United States*, 278 U.S. 221, 227-228; *United States* v. *Peachtree National Distributors*, 456 F.2d 442, 444-445 (C.A. 5).

2. The court of appeals' decision strikes a proper balance between the need to preserve prints of the film "School Girl" as evidence in the pending criminal proceeding and petitioners' asserted right to continue to distribute and show the film.

In *Heller* v. *New York*, 413 U.S. 483, this Court held that, given the fact that a print of a film may be easily destroyed, altered and/or transported, it may be seized pursuant to a search warrant for preservation as evidence in a criminal proceeding (a) if the finding of

probable cause upon which the warrant was issued was the result of an independent judicial determination and (b) if the seizure was promptly followed by a determination of the obscenity issue in an adversary proceeding. In recognition of the rights of the exhibitor during the period between the initial seizure and the adversary proceeding, however, this Court further held that the exhibitor should be permitted to obtain a copy of the film if he demonstrates that no other copy is available to him. *Id.* at 492-493.

The decision of the court of appeals in the present case provides even greater protection to any First Amendment rights petitioners may have than the procedure provided in *Heller*. The search warrants here, unlike the warrant in *Heller*, were obtained after, not before, an adversary hearing on the issue of obscenity (a hearing which petitioners do not contend was inadequate). Thus, the basis for the seizure of prints of the film "School Girl" was even firmer than the basis found sufficient in *Heller*.

Despite this fact, moreover, the court of appeals took the additional step of directing the district court to determine whether the prints seized were necessary to the criminal prosecution and to permit the petitioners to make copies of those prints whose seizure was required. The purpose of this was to ensure that petitioners would continue to be able to distribute and show the film until the issue of its obscenity was finally resolved.

Petitioners seek to distinguish *Heller* on the ground that there only one copy of a film was seized, and the right of continued exhibition pending a final determination of the obscenity issue was easily protectable, but that ten to twelve prints of "School Girl" have been seized and their rights cannot be protected in a similar manner

(Pet. 8-10). Petitioners admit, however, that not all prints of the film were seized (Pet. 9).[5] More importantly, the court of appeals' decision ensures that only those prints required for the criminal prosecution will be retained, that any prints not required will be returned, and that any prints required and hence not returned will be made available for copying.[6] In these circumstances, given the perishability of film paints (*Heller* v. *New York*, *supra*, 413 U.S. at 493) and the fact that the film was declared to be obscene at the conclusion of an adversary hearing (cf. *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Marcus* v. *Search Warrant*, 367 U.S. 717), the court of appeals' decision adequately protects any First Amendment rights that may be involved. Cf. *United States* v. *Orito*, 413 U.S. 139, 143; *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123, 126; *Miller* v. *California*, 413 U.S. 15, 23.

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[5]Petitioners contend that the fact that most prints of the film remain in circulation does not mean that they will be shown. According to petitioners, exhibitors will not continue to rent and show the film if, by so doing, they risk seizure of the print they have rented and the consequent loss of whatever investment they have made in advertising the film. At the same time, however, petitioners concede that exhibitors will not be reluctant to rent the film if all prints are subject to certain record-keeping requirements and to ultimate production at trial in Tennessee. There is no reason to suppose, and petitioners advance none, that exhibitors would be any more reluctant to rent the film if informed that, should the print rented be required for the criminal prosecution in Tennessee, they will be provided a substitute print.

[6]Petitioners argue that permission to make copies of any prints properly retained by the government does not adequately protect their First Amendment rights since the cost and difficulties involved in copying makes the solution "unrealistic and unworkable" (Pet. 11). But petitioners have offered no evidence to that effect, and their unsupported allegations are not an adequate substitute.

3. Petitioners also contend that 18 U.S.C. 371 is unconstitutional insofar as it permits a criminal prosecution for a nationwide conspiracy on the basis of a finding of obscenity in a single community (Pet. 15-18). Petitioners did not raise this issue below,[7] and we submit that it is, in addition, premature since the criminal proceedings have just been begun.

The thrust of petitioners' constitutional challenge is that a conspiracy charge bottomed on an alleged substantive violation of federal obscenity statutes may be no more extensive geographically than the localities from which jurors will be drawn. This conclusion is dictated, according to petitioners, by the test for obscenity announced in *Miller* v. *California*, 413 U.S. 15. It assumes, moreover, that in deciding whether material is obscene, individual jurors are limited by the *Miller* test to applying the standards of their own communities.

This argument overlooks the decision in *Hamling* v. *United States*, No. 73-507, decided June 24, 1974. The Court held in that case that in determining whether a violation of federal obscenity statutes has been established, jurors may draw upon their knowledge of their community, as well as such evidence of the "average person" in other areas of the country as petitioners determine to introduce. Slip op. 15-16. This affords petitioners adequate protection that the film "School Girl" will not be judged "on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insensitive person or group" (*id.* at 17), while at the same time avoiding the application of an unascertainable national standard. See *United States* v. *12 200-ft. Reels of Film, supra*; *Miller* v. *California, supra*.

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[7]In their complaint, petitioners did assert that 18 U.S.C. 1462 and Rule 17, F.R. Crim. P., were unconstitutional.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1975.